DOCUMENT RESUME

ED 292 189 EA 019 901

AUTHOR Smith, Margaret D.; Zirkel, Perry A.
TITLE Bargaining.
PUB DATE 87
NOTE 35p.; In: Thomas, Stephen, B., Ed. The Yearbook of School Law, 1987. National Organization on Legal Problems of Education, 1987 (EA 019 899).
PUB TYPE Legal/Legislative/Regulatory Materials (090) -- Reports - Evaluative/Feasibility (142)

EDRS PRICE MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS Arbitration; *Collective Bargaining; Compliance (Legal); Constitutional Law; *Court Litigation; Due Process; Elementary Secondary Education; *Employer Employee Relationship; *Labor Relations; Legal Problems; Legal Responsibility; Negotiation Agreements; Negotiation Impasses; *School Law; School Responsibility; Strikes; Teacher Rights; Unions

ABSTRACT

This chapter reviews collective bargaining cases in education during 1986. Although the courts addressed a broad range of topics, no new legal principles were applied in these cases. The courts relied on traditional labor law concepts and applied them to the specific statutes and policies of the applicable jurisdiction. The review addresses the following issues: constitutional issues; authority to bargain; recognition and representation issues, including determination of bargaining unit and elections; rights and obligations of exclusive bargaining representatives; scope of bargaining, including mandatory, permissive, and prohibited topics of bargaining; grievability and arbitrability issues; judicial review of arbitration awards and employment relations board rulings; impasse and dispute resolution; strikes and other job actions; and other miscellaneous decisions arising from labor disputes. (TE)

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BARGAINING

Margaret D. Smith and Perry A. Zirkel

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INTRODUCTION

This year's array of collective bargaining cases in education constituted a broad range of topics and holdings by the courts. There were no new legal principles applied in the collective bargaining cases. The courts relied on traditional labor law concepts and applied them to the specific statutes and policies of the applicable jurisdiction. There was no paucity of cases; the total number exceeded those in recent previous years.

CONSTITUTIONAL ISSUES

A plethora of education collective bargaining cases containing constitutional issues were decided by the American courts during 1986. The only collective bargaining case arising in the school context that was decided by the United States Supreme Court in 1986 was *Chicago Teachers Union, Local No. 1 v. Hudson*,[1] in which nonunion employees of a board of education brought suit challenging a procedure established pursuant to a collective bargaining contract for determining the amount of the agency shop, or "fair share," fee. Writing for a unanimous court, Justice Stevens ruled that under an agency shop agreement narrowly tailored procedural safeguards are necessary to prevent compulsory subsidization of ideological activity to nonunion employees who object to them, while at the same time not restricting the union's ability to require any employee to contribute to the cost of collective bargaining activities. The nonunion employee, whose first amendment rights are affected by the agency shop agreement and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. In this case, the union procedure was found to contain three constitutional defects. First, it failed to minimize the risk that nonunion employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide nonmembers with adequate information about the basis for the proportionate share from which the advance deduction of dues was calculated. Third, it failed to provide for a reasonably prompt decision by an impartial decisionmaker. Generalizing from these defects, the Court held that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

In a subsequent and overlapping case, a federal district court in

1. 106 S. Ct. 1066 (1986).

Michigan heard a case brought by nonmembers of a teachers' union challenging the scope of and procedure for its agency shop fee.[2] As to the procedure for the fee, the court held that the nonmembers were entitled to the disclosure of actual, rather than merely budgeted, expenditures by the bargaining unit. Relying on the *Chicago Teachers' Union* decision, the court ruled that the union's procedures for nonmember challenges to the agency fee calculations were defective in that the procedures offered no assurances that nonmembers' funds would not be temporarily used for objectionable purposes, failed to disclose adequate information concerning the basis for the reduced fee calculation, and did not provide for a reasonably prompt hearing before an impartial decisionmaker. As to the scope of the fee, the court held on constitutional grounds that the union's expenses for lobbying, travel to state and national conventions, publications, and litigation were legitimately includable to the extent that they were germane to the union's duties as bargaining representative. On the other hand, the union's organizing expenses and its loans to support an affiliated union's strike were not constitutionally chargeable.

Other lower court cases also addressed the issue of the scope of an agency shop fee. In a case brought by a teachers' association to collect "fair share" representation fees from nonmembers, an Indiana appellate court held that the association's representation fee properly included expenditures used for the following purposes: to send representatives to annual conventions and workshops; to provide a dinner where building representatives were trained concerning the terms of the collective bargaining agreement; to provide an association luncheon for new teachers; to send a representative to a march in Washington, D.C.; to conduct social programs (including expenditures to honor retiring teachers); to conduct professional development workshops; to send payments to the association's state and national affiliates; and to cover miscellaneous expenses including floral arrangements and public relations.[3] Furthermore, in another case the same court held that nonmember teachers could constitutionally be required, pursuant to a collective bargaining agreement, to pay their fair share of the teachers' association expenses for organizing; lobbying (including the hiring of outside organizations for this purpose); legal, negotiating, and research services; and state and national affiliation.[4] Objecting nonmembers could not, however, be forced to pay for political or ideological activities unrelated to collective bargaining, contract administration, or the association's

2. Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306 (W.D. Mich. 1986).
3. Abels v. Monroe County Educ. Ass'n, 489 N.E.2d 533 (Ind. Ct. App. 1986).
4. New Prairie Classroom Teachers Ass'n v. Stewart, 487 N.E.2d 1324 (Ind. Ct. App. 1980).

duties as the exclusive bargaining agent.

In a related case, the Massachusetts Supreme Court addressed two constitutional issues.[5] First, the court held that public employees who are not union members, but who may be required as a condition of their employment to pay an agency fee, have a constitutional right to prevent a union's spending a part of their service fee to contribute to political candidates and to express political views unrelated to its duties as exclusive representative. Second, the court ruled that the Massachusetts Labor Relations Commission's regulation providing a forty-five day limitation period on agency fee challenges was unconstitutional under the equal protection clause, in light of the six-month limitation period on other prohibited practice complaints.

The entirely separate issue of the constitutionality, under the fourth amendment, of drug testing was addressed in one New York case.[6] The specific issue was whether probationary teachers could be compelled to submit to investigatory urine testing even though there was no particularized indication that they currently or in the past had used illegal drugs. In reaching its ruling the court found that this drug testing did not fall within the collective bargaining agreement's provision that probationary teachers "fulfill the requirements for a medical examination and tuberculin test." Further finding that the proposed urine test was a search within the meaning of the fourth amendment, the court balanced the board of education's interest in ensuring that its employees are fit to perform their jobs against the teacher's expectation of privacy, concluding that the proper standard for requiring that a teacher submit to drug tests is particularized reasonable suspicion. The court noted that in the instant case there was "strikingly absent from the record even a scintilla of suspicion, much less a reasonable suspicion."[7]

Constitutional issues arose in discharge cases related to collective bargaining. The Tenth Circuit rejected a claim by a teacher that her discussion of a teacher's aide's time was constitutionally protected speech.[8] The court ruled that the speech was so disruptive that it was not entitled to first amendment protection. The court concluded, however, that there was sufficient evidence that the motivation for the nonrenewal of the faculty representative's teaching contract was in retaliation for her union activity to send that issue to the jury. In a California case, the state's intermediate, appellate court reversed a teacher's termination which had been based on a collective bargaining provision.[9] The

5. Lyons v. Labor Relations Comm'n, 492 N.E.2d 343 (Mass. 1986).
6. Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (App. Div. 1986).
7. *Id.* at 891.
8. Sayre v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862 (10th Cir. 1986).
9. Phillips v. California State Personnel Bd., 229 Cal. Rptr. 502 (Ct. App. 1986).

provision specified that voluntary or involuntary absence without leave for five consecutive working days constituted automatic resignation. Starting from the principle that public employees have a property interest in continued employment, and thus are entitled to procedural due process before discharge, the court ruled that collective bargaining agreements may not contain provisions that abrogate employees' fundamental constitutional rights or their federal statutory rights.

Procedural due process was also at issue in a federal case where a teacher, in a *pro se* proceeding, alleged that an inadequate grievance process constituted a violation of his due process rights.[10] The court found that the plaintiff neither claimed in his complaint nor subsequently showed that he was deprived of any liberty or property interest. Absent such an interest, no due process was appropriate, and the case was dismissed.

Similarly rejecting procedural due process as an issue, a Texas appeals court also granted a summary judgment against the alternative bases for a suit by noncontractual employees of a school district who had been denied a hearing before the board of trustees to review the superintendent's denial of their employment grievances.[11] The court found no violation of the state's right-to-work law nor the "redress of grievances" articles in the state constitution. Finally, the court rejected their first amendment claim, because any member of the general public or any employee of the school district could address the school district's board of trustees during its open sessions.

Several constitutional issues were presented in a Florida case.[12] The plaintiff unions challenged a merit school statute that provided economic incentives to employees at meritorious schools. The court held that this statute did not contravene teacher collective bargaining rights secured under the state constitution and that it was not an unconstitutional delegation of legislative authority. The plaintiffs also raised an equal protection claim, arguing that rewarding schools based on student performance on standardized exams bears no relationship to the goal of enhancing teaching. Based on the record presented, the court rejected this argument, finding a rational relationship to be conceivable. The plaintiff unions further challenged, on the basis of equal protection, a master teacher statute that provided incentive awards of not less than $3,000 to teachers who qualified. The court rejected this claim, finding the imperfections in this program to be reasonable rather than fatal.

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10. Taverna v. Churchill, 638 F. Supp. 243 (D. Mass. 1986).
11. Corpus Christi Indep. School Dist. v. Padilla, 709 S.W.2d 700 (Tex. Civ. App. 1986).
12. Florida Teaching Profession v. Turlington, 490 So. 2d 142 (Fla. 1986).

AUTHORITY TO BARGAIN

Only one case in 1986 involved the authority to bargain, and it specifically addressed the issue of which governmental entity was authorized to bargain with higher education employees pursuant to Pennsylvania's passage of the State System of Higher Education Act.[13] Prior to the passage of the Act, the Commonwealth of Pennsylvania had been certified by the Pennsylvania Labor Relations Board (PLRB) as the employer of all managerial and professional employees of the state colleges and of Indiana University of Pennsylvania. After the Act, the PLRB ruled that the Commonwealth was the public employer but that the State System of Higher Education, through its chancellor, was authorized to conduct collective bargaining negotiations. The appellate court upheld the order, ruling that the State System of Higher Education was clearly designated as the public employer of the professional and managerial employees of the State System of Higher Education, and as such was authorized, through its chancellor, to conduct collective bargaining negotiations with representatives of the professional and managerial employees of these institutions. The court also ruled that the Commonwealth was not to be classified as a joint employer authorized to conduct collective bargaining with these employees.

RECOGNITION AND REPRESENTATION ISSUES

Unit Determination

Supervisory, Managerial, and Confidential Employees. Several unit determination cases were presented to state courts in 1986. The status of a range of employee roles, including supervisors and secretaries, were at issue under various state collective bargaining statutes.

In an Indiana case, an appellate court held that three new professional positions (viz., football statistician, guidance coordinator, and computer coordinator) were excluded from the bargaining unit under a state statute that allowed for a unit composed of personnel who have "no administrative or supervisory responsibilities."[14] Reasoning that a court should give a word, in this case "administrative," its plain and ordinary meaning when it was not defined in the statute, the court held that the school board had no obligation to bargain with the teachers' association over the three positions.

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13. Board of Governors of State System of Higher Educ. v. Commonwealth, 514 A.2d 223 (Pa. 1986).

14. Board of Trustees v. Indiana Educ. Employment Relations Bd., 498 N.E.2d 1006 (Ind. Ct. App. 1986).

Similarly, a Michigan appellate court excluded a coordinator of gifted and talented from a teachers' bargaining unit, ruling that her position was supervisory because she had been delegated the authority to recommend hiring of certain individuals and to direct members of her staff.[15] The court reasoned that it was "not the exercise of authority, but the delegation of authority which was indicative of the attributes of a supervisor,"[16] and that it was insignificant that some of the coordinator's powers had not been exercised or come to fruition.

In another case concerning supervisory status, school supervisors who were not members of the professional employees' association brought suit in Wisconsin court for injunctive relief and return of monies collected pursuant to a fair-share deduction clause in the collective bargaining agreement. Finding that the legislature specifically excluded school supervisors from the applicable collective bargaining statute, the appeals court ruled that the fair share deductions be returned to these excluded employees.[17]

The status of certain school district secretaries was at issue in an Illinois case where the court ruled that the school principals' secretaries were qualified to be in a bargaining unit of secretaries, because "confidential employees" were defined as working for "managerial employees" and the principals that they worked for were not "managerial employees."[18] The secretary to an assistant superintendent was found to be a confidential employee, however, because the assistant superintendent "formulated, determined, and effectuated policy" with regard to labor relations.

Finally, the status of part-time employees was at issue in a Minnesota case.[19] The appeals court found that the term "normal work week" as used in the applicable statute for determining whether part-time employees could be included in collective bargaining units, referred to the normal, predominant work week of full-time employees. Noting that the state legislature, in enacting the collective bargaining statute, was concerned with maintaining the integrity of bargaining units by excluding part-time workers who tend to have little in common with full-time workers, the court held that the plaintiff part-time employees were excluded from the bargaining unit.

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15. Michigan Educ. Ass'n v. Clare-Gladwin Intermediate School Dist., 396 N.W.2d 538 (Mich. Ct. App. 1986).

16. *Id.* at 541.

17. Perry v. Milwaukee Bd. of School Directors, 388 N.W.2d 638 (Wis. Ct. App. 1986).

18. Board of Educ. v. Illinois Educ. Labor Relations Bd., 493 N.E.2d 1130 (Ill. App. Ct. 1986).

19. Independent School Dist. No. 721 v. School Serv. Employees Local 284, 379 N.W.2d 673 (Minn. Ct. App. 1986).

Other Representation and Recognition Issues. In a California case, the union brought suit on behalf of two temporary teachers who were members of the bargaining unit but not members of the union.[20] The state's intermediate appellate court overturned the trial court's decision that the union had no standing in the case. The appellate court held that the union could bring representative action even if, at the time of the action, the affected employee was not a member of the union or the union was no longer the exclusive representative.

In another California case, the state's highest court ruled that medical housestaff, who were M.D.'s participating in the University of California's residency programs, were "employees" under the California Higher Education Employer-Employee Relations Act and were therefore entitled to collective bargaining rights.[21] While the residents were also students of the University, the standard for determining their employee status was whether their educational objectives were subordinate to the services they performed and whether according them collective bargaining rights would further the purposes of the Act. The court ruled that they met both standards.

Union recognition at a church-related university was the subject of a case decided by the First Circuit Court of Appeals.[22] The university had been founded by the Dominican Order of the Roman Catholic Church and was located on the grounds of a Dominican seminary. The majority of its board of trustees were required to be members of the Dominican Order. Despite these religious aspects, however, the university defined its objective as "humanistic education at an academic level," and in recruiting students of all creeds, it had an open admissions policy. Attendance at Mass was optional. Only one theology course was required, which focused on the historical and literary analysis of the Bible. The faculty, who were hired on the basis of experience and ability rather than religious affiliation, voted in favor of union representation, but the university refused to bargain. In response to bargaining order by the National Labor Relations Board (NLRB), the university contended that, under Supreme Court precedents,[23] the NLRB had no jurisdiction over the university. Rejecting this contention and distinguishing these decisions, the First Circuit held that the NLRB's jurisdiction over the university was proper and would not create a risk of violating either the establishment clause or the free exercise clause of the Constitution. In

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20. Anaheim Elementary Educ. Ass'n v. Board of Educ., 225 Cal. Rptr. 468 (Ct. App. 1986).

21. Regents of Univ. of Cal. v. Public Employment Relations Bd., 715 P.2d 590 (Cal. 1986).

22. Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1985).

23. NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Lemon v. Kurtzman, 403 U.S. 602 (1971).

view of the above mentioned facts, the court found that the university had religious functions, but its predominant higher education mission was to provide students with a secular education.

Elections

Of the three cases in 1986 that dealt with representation elections, two were decided by the Oklahoma Supreme Court. In the first, the court addressed the issue of the proper role of the school board in resolving competing claims of rival labor organizations seeking to represent the district's teachers.[24] The court held that the school board had an affirmative nondiscretionary duty to participate in the settlement of unresolved disputes between competing bargaining organizations. Inasmuch as the state's collective bargaining statute mandated a specific procedure for selecting the bargaining representative in districts with 35,000 students or more, but not for those with under this enrollment level, the court was faced with a "gap in the law" rather than mere statutory interpretation. Reasoning that the overriding legislative intent is the desirability of some orderly process for regulating collective bargaining in education, the court applied the election procedures outlined for school districts of 35,000 or more to districts with less than that level. Finally, noting that the collective bargaining statute provided no sanctions for violations of its provisions, the court ruled that a writ of mandamus was not only a proper form of relief, it may well have been the only adequate remedy.

In the second Oklahoma election-related case, the teachers' association sought a writ of mandamus to require the board of education to either recognize them as the bargaining agent for the teachers based on authorization cards or to call an election.[25] The school board counterargued that, based on a ruling in the preceding case, recognition elections must be by secret ballot and that the association's request for an election was not timely. The Oklahoma Supreme Court ordered the school board to immediately examine and tabulate the authorization cards that had been submitted to it by the association and to either grant or withhold recognition of the association based on the majority of those votes. The court held that the new law did not retroactively invalidate the selection of representatives by the authorization-card method, because traditionally all but two school districts in the state had relied on this less costly, less formal method; therefore, declaring the procedure void in the instant case could have the effect of creating chaos throughout the state.

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24. Maule v. Independent School Dist. No. 9, 714 P.2d 198 (Okla. 1986).
25. DeLafleur v. Independent School Dist. No. 11, 727 P.2d 1352 (Okla. 1986).

In an Indiana case, the current exclusive representative of a school district's employees brought action challenging the state Education Employment Relations Board's (EERB) order that a third runoff election be conducted between the district and another association.[26] The trial court had issued a preliminary injunction against the third election pending a trial on the merits to determine whether such an election was proper. The appellate court reversed, holding that the association had failed to exhaust its administrative remedies and, thus, that the trial court lacked jurisdiction to issue the injunction. Furthermore, the association had failed to show that it would suffer irreparable harm should the third election take place. Indeed, the court pointed out that if the association had won the election there would have been no harm whatsoever, and if it lost the election it could appeal its decertification to the full EERB and then seek judicial review.

Rights and Obligations of Exclusive Bargaining Representative

Union Rights

The University of California sought review of a decision by the state's PERB that the university had acted unreasonably in denying a labor union access to official banner space on campus.[27] The state's intermediate appellate court ruled in favor of the University, reasoning that a statute granting unions the right of access to employees of public higher education institutions did not apply to every possible means of such access. The court also found that denying the union the use of the banner space was not unreasonable, because to have permitted such use would have violated a statutory prohibition against showing preference to one employee union over another.

In an entirely different context, the District of Columbia Court of Appeals remanded for further explanation or reconsideration a case in which a union representing nonsupervisory professional personnel in the Department of Defense Dependents Schools requested data concerning both the bargaining unit and managerial employees in order to ascertain whether a disparate treatment argument might be used in an employee's behalf.[28] The court ruled that the Federal Labor Relations Authority failed to adequately supply a reason why a supervisor's disciplinary

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26. Scott County Fed'n of Teachers v. School County School Dist., 496 N.E.2d 611 (Ind. 1986).

27. Regents of Univ. of Cal. v. Public Employment Relations Bd., 223 Cal. Rptr. 127 (Ct. App. 1986).

28. North Germany Area Council, Overseas Educ. Ass'n v. Federal Labor Relations Auth., 805 F.2d 1044 (D.C. Cir. 1986).

sanctions for the same offense as unit employees was not relevant to the employee's case.

Obligations of Exclusive Representatives

Unions are required, as part of their obligations as exclusive representatives of their members, to fulfill certain duties. A few cases in 1986 related to one of these obligations: the duty of fair representation.

In a Connecticut case, an administrator brought an action against the board of education and his union.[29] The teacher alleged that the union had breached its duty of fair representation by failing to process his grievance through binding arbitration. The union had processed his grievance through the first three steps of the contractual grievance procedure. The grievance had been denied at each step, with representatives of the board explaining that under the collective bargaining agreement the plaintiff's recall rights had expired one year after his demotion from principal to teacher. On the advice of its counsel, the union decided not to take the matter to binding arbitration. Connecticut's highest court ruled in favor of the union, declaring that "in fulfilling the duty to fairly process legitimate grievances of individual employees, a union must be given the discretion to winnow out frivolous claims prior to the most costly and time consuming step in the grievance procedure."[30]

A similar holding was reached in a parallel New York case.[31] The plaintiff, a principal and member of the defendant union, had applied for a longevity increment. The school district denied the application, informing the plaintiff that he had to retire in order to be eligible for the increment. Despite its belief that the grievance was meritless, the union nevertheless assisted the plaintiff through the first three stages of the contract's grievance procedure. Thereafter, the union's executive board submitted the issue of whether to proceed with arbitration to the union's membership, which voted not to pursue arbitration. The plaintiff then filed suit against the union, alleging breach of its statutory duty of fair representation. The court found that there was no such breach in the absence of discrimination, arbitrariness, or bad faith on the part of the union. The court clarified that a union is not required to carry every grievance to the highest level; it must be permitted to assess each grievance with a view of its individual merits and its consistency with prior and pending grievance cases.

The duty of fair representation was considered incidentally in the aforementioned[32] Massachusetts case where a teacher alleged that the

29. Masto v. Board of Educ., 511 A.2d 344 (Conn. 1986).
30. *Id.* at 347.
31. Symanski v. East Ramapo Cent. School Dist., 502 N.Y.S.2d 209 (App. Div. 1986).
32. See *supra* note 10 and accompanying text.

school board did not process his grievance fairly.[33] While ruling that the teacher failed to exhaust the remedies available under the collective bargaining agreement, the court noted that even if the plaintiff could have been deemed to have exhausted the grievance process, or even if his failure to do so could be excused, any claims based upon the collective bargaining agreement should be dismissed on the grounds that the plaintiff had brought the action without the support of the association. Without showing that the association had breached its duty of fair representation, a member cannot sue his employer in Massachusetts without the support of his union.

This duty also arose as a secondary or contingent matter in a New York case where a terminated teacher petitioned for a writ of mandamus directing the chancellor of the board of education to restore his teaching license and to compel his reinstatement as a teacher.[34] The appellate court ruled that the teacher was entitled to an administrative determination, but that he could not compel arbitration because he was not a party to the agreement between the school board and the teachers' union. According to the court, the teacher's only remedy would have been to sue his union to determine whether it had lived up to its fiduciary obligation to represent him fairly.

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

Several cases in 1986 dealt with mandatory topics of bargaining. Most of these cases reflected a trend favoring mandatory negotiability. In a Florida case, the court held that supplemental pay for coaching duties performed by teachers was a "wage" under that state's collective bargaining statute and, as such, was a mandatory subject of bargaining.[35] Similarly, Iowa's highest court held that subjective criteria for teacher evaluations and the right to grieve teacher evaluations were mandatory subjects of bargaining under that state's statute.[36] Likewise, the Kansas Supreme Court ruled that the manner of distribution of the surplus health insurance premiums that had accrued under a group health insurance plan, pursuant to a collective bargaining agreement, was mandatorily negotiable.[37] However, since the surplus was the result of a previously negotiated contract which also had specified the method of

33. Taverna v. Churchill, 638 F. Supp. 243 (D. Mass. 1986).
34. Lubin v. Board of Educ., 501 N.Y.S.2d 31 (App. Div. 1986).
35. School Bd. v. Levy County Educ. Ass'n, 492 So. 2d 1140 (Fla. Ct. App. 1986).
36. Aplington Community School Dist. v. Iowa Pub. Employment Relations Bd., 392 N.W.2d 495 (Iowa 1986).
37. Board of Educ. v. Kansas-Nat'l Educ. Ass'n, 716 P.2d 571 (Kan. 1986).

distribution of a divisible surplus, further negotiation on the distribution was inappropriate.

A Michigan case added a surprising entry on the mandatory side of the ledger.[38] In this case, a school system had unilaterally changed one of its practices regarding health insurance, which had actually been contrary to the collective bargaining agreement, to bring it in line with the agreement. The question raised on appeal was whether an employer must bargain about a subject explicitly covered by a contract where the employer had established a practice contrary to the contractual language or whether instead it could unilaterally revert to enforcing the language of the collective bargaining agreement. The court ruled that the school district was required to provide the union with notice and an opportunity to bargain before making changes involving a mandatory subject of bargaining, even though the employer had changed its traditional practice so that it would no longer be contrary to the collective bargaining agreement.

Permissive Topics of Bargaining

Only two entries appeared in 1986 on the permissive side of the ledger. In a Maryland case, the teachers' association claimed that under state statute the school board was required to negotiate with it with respect to the school calendar and the reclassification of employees.[39] The court reasoned that these issues were somewhat related to salaries, wages, and hours but were significantly related to educational policy and therefore were subject to permissive, not mandatory, bargaining. Similarly, a New York court held that, under that state's statutory framework, while a school board could not be deprived of its right to determine the qualifications of its teachers, the procedures to be utilized in filling vacancies is a permissive subject of bargaining.[40] Therefore, pursuant to the parties' existing contract, the seniority of equally qualified teachers could, but not must, properly be a subject of collective bargaining negotiations.

Prohibited Topics of Bargaining

In another New York case, the court went a step further, holding that a provision in a collective bargaining agreement that required the school district to hire only persons within the bargaining unit to fill vacancies,

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38. Mid-Michigan Educ. Ass'n v. St. Charles Community Schools, 389 N.W.2d 482 (Mich. Ct. App. 1986).

39. Board of Educ. v. Montgomery County Educ. Ass'n, 505 A.2d 905 (Md. Ct. Spec. App. 1986), *cert. granted*, 505 A.2d 905 (Md. 1986).

40. Dutchess County Bd. of Coop. Educ. Serv. v. Newman, 505 N.Y.S.2d 711 (App. Div. 1986).

with no provision for judging the qualifications of the applicants, violated public policy and, thus, was unenforceable.[41]

GRIEVABILITY AND ARBITRABILITY

Presumption of Arbitrability

Several arbitrability cases arose in New York, which has a strong public policy exception to comprehensive binding grievance arbitration. Where public policy matters are not the subject, however, the general presumption in favor of arbitration applies. Consider, for example, the 1986 case in which the trustees of a community college denied a promotion to an instructor who lacked a master's degree in his field.[42] When he grieved, the college sought a court stay to prevent arbitration of the grievance. The court ruled that the resolution of a dispute over the college's requirement of a master's degree as an indispensable condition of promotion depended purely on interpretation of the collective bargaining agreement, evincing a clear intention to arbitrate. In another such case, a school district sought to stay arbitration of a grievance relating to an alleged violation of the transfer and promotion provisions of a collective bargaining agreement.[43] New York's intermediate appellate court ruled that the topic of this grievance was included in the grievance procedure of the collective bargaining agreement and that, since it was not prohibited by the state law or by public policy, it was arbitrable. The court also ruled that the effect of collateral estoppel, based on prior litigation on voluntary transfers, was a matter that was outside the scope of judicial inquiry and within the exclusive province of the arbitrator. As a final example in this line of New York cases, the same court preliminarily reviewed the merits to determine the arbitrability of a grievance filed on behalf of a teacher whose application for a grant of sick leave from a "sick leave bank," established pursuant to a collective bargaining agreement, was rejected by the school board's designated representative to the sick leave bank governing committee.[44] The collective bargaining agreement contained a provision that the committee's decisions were "final"; however, when a rejection was "deemed totally without justification," it could be submitted for nonsubstantive arbitral review. The court denied the stay of arbitration, finding that the grievance was subject to review by the arbitrator because the commit-

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41. Enlarged City School Dist. v. Troy Teachers' Ass'n, 501 N.Y.S.2d 955 (App. Div. 1986).

42. County of Broome v. Croll, 499 N.Y.S.2d 18 (App. Div. 1986).

43. East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 498 N.Y.S.2d 4 (App. Div. 1986).

44. Board of Educ. v. Middletown Teachers Ass'n, 497 N.Y.S.2d 429 (App. Div 1986).

tee's decision in this case was without procedural as well as substantive justification.

Two 1986 decisions appeared on the "public policy" side of New York's arbitrability analysis. In one case, a teacher had not obtained a teaching certificate within one year, which had been required by an education hearing panel, in order for him to retain his position.[45] The appellate court held that the teacher and the union were not entitled to arbitration where the issue had already been solved through litigation. That the teachers' union alone had been the party to the arbitration and that it had not been a party to the teacher's prior litigation did not, in the court's view, entitle the union to arbitration in a case in which the interest of the union and the interest of the teacher were identical. In the other case, the same court held that since the sole issue submitted to the arbitrator was whether the clause in the collective bargaining agreement discriminated on the basis of marital status, the issue encompassed a nonarbitrable matter of public policy.[46] The court concluded that the determination of the issue should be raised before either the courts or the state's Human Rights Commission.

Arbitrability cases also arose in other jurisdictions. In an Illinois case, the collective bargaining agreement required arbitration of all unresolved grievances, and a state statute provided a specific method for determining the sequence of reduction-in-force, unless an alternative method was established in a collective bargaining agreement between the board and teachers' association.[47] Given that express statutory authority, the court held that a grievance resulting from the board of education's reduction in the number of tenured teachers presented arbitrable issues, which included whether the reduction-in-force had in fact been the result of economic conditions, whether the administrative consequences of the board's determination had been properly applied, and whether teachers had been laid off in the proper manner.

The relationship between negotiability and arbitrability was reflected in another case in which a university in Ohio had entered into custodial service contracts with independent contractors at the same time that the university had imposed a hiring freeze on civil service custodial personnel.[48] The Ohio Supreme Court sharply admonished the university, stating: "[c]ivil servants, themselves, are thus in a position to

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45. Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).

46. Fallon v. Greater Johnstown School Dist., 499 N.Y.S.2d 503 (App. Div. 1986). For related decisions, see *infra* notes 68-69 and accompanying text.

47. Board of Educ. v. Cre.e-Monee Educ. Ass'n, 497 N.E.2d 1348 (Ill. App. Ct. 1986). For other pro-arbitrability decisions, see *infra* notes 70-71 and accompanying text.

48. Local 4501, Communications Workers of Am. v. Ohio State Univ., 494 N.E.2d 1082 (Ohio 1986).

'protect,' the civil service system at the bargaining table; and public employers no longer have a 'free hand' to dismantle a civil service personnel system by enforcing a hiring freeze in conjunction with the letting out of independent contracts."[49] The court, after finding that the matter was one that pertained to "wages, hours, or terms and other conditions of employment," held that the issue was a proper subject of collective bargaining and as such should be resolved through arbitration.

Who Determines?

Several cases in 1986 involved the multi-faceted issue of who makes the decision where arbitration may be a possible forum. As to the arbitrability aspect, the cases in the immediately preceding section of this chapter reveal that courts sometimes make the initial determination and always have the power to make the final determination as to whether a grievance is arbitrable. Other cases address the dual or multiple forum aspect (i.e., whether arbitration or another forum—typically the courts or an administrative agency—should decide a particular dispute).

The choice of forum between arbitration and the courts arose at the end of a Maryland case in which teachers whose certificates had been reclassified from first to second class filed grievances which the county superintendent refused to consider.[50] By state statute, the state board of education was delegated the authority to interpret the provisions of the education code within its jurisdiction and to decide all disputes arising thereunder. The same statute also provided for the right to timely appeal the decision of a county superintendent successively to the county board and to the state board of education. The state's appellate court overturned the trial court's and arbitrator's decisions in this case, ruling that the teachers had not first pursued and exhausted their administrative remedy of an appeal to the state board of education. The court added, however, that once those statutory interpretation questions were resolved through the administrative and judicial review processes, a teacher in the school district could elect either the remedy of arbitration or judicial review.

This choice of forum was more central in a suit brought by a part-time teacher against a school board in Illinois.[51] The collective bargaining agreement with the school district provided that the board recognize the association as the exclusive representative of "all regularly employed full-time certified employees and all 'regularly' part-time

49. *Id.* at 1086.
50. Board of Educ. v. Hubbard, 506 A.2d 625 (Md. 1986).
51. Ballard v. Board of Educ., 489 N.E.2d 896 (Ill. App. Ct. 1986).

certified employees who are employed for four or more hours per school day."[52] While the teacher had previously been a full-time employee, she was currently employed in a two-fifths time position. The appellate court held that the teacher was not restricted to the grievance and arbitration procedure of the collective bargaining agreement and that alternatively she could resolve her dispute through the courts.

The sequence of the arbitration and judicial forums was the focus of cases in other jurisdictions. In a Washington case, a custodian alleged breach of contract after a position for which he applied was given to an employee with less seniority.[53] The appellate court held that while the trial court does not have automatic jurisdiction in such cases, in that the parties are required to follow dispute resolution methods for which they have contracted before they resort to the courts, in this instance the case was properly before the court. The applicable statute provided that arbitration or mediation was valid and irrevocable if the employee and employer agreed to submit to mediation arbitration. In this case the parties had agreed to mediation, but when they attempted to have the state's PERC mediate, this agency refused. Additionally, this court proceeding ensued a number of years after the other applicant assumed the head custodians position. Under these circumstances the court held that the grievance procedures set forth by the contract were substantially complied with, and that the case was properly before the courts.

A clearer example of the sequencing issue is a Connecticut case in which the trial court enjoined a school district from terminating the employment contracts of ten school administrators and from eliminating nine administrative positions. On appeal, the Connecticut Supreme Court ruled that the plaintiff employees had failed to exhaust the exclusive grievance and arbitration procedures established in their collective bargaining agreements before seeking redress in the courts and that their suit should be dismissed for lack of jurisdiction.[54] Similarly, in Illinois and Texas cases, the appellate courts held that the school employees were required to exhaust administrative remedies, including arbitration, before seeking relief in the courts.[55]

Two Minnesota cases further clarify the differential importance, depending on the circumstances, of exhausting the arbitral forum before proceeding to the judicial forum. In one Minnesota case, a teacher had

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52. *Id.* at 897.

53. Yaw v. Walla Walla School Dist. No. 140, 722 P.2d 803 (Wash. 1986).

54. School Adm'rs of New Haven v. Dow, 511 A.2d 1012 (Conn. 1986).

55. Patterson v. Carbondale Community High School Dist. No. 165, 494 N.E.2d 240 (Ill. App. Ct. 1986); Houston Indep. School Dist. v. Houston Fed'n of Teachers, 715 S.W.2d 369 (Tex. Cir. App. 1986). The Illinois decision enumerated exceptions of futility or repudiation.

been placed on unrequested leave (i.e., RIFed at the end of the school year).[56] The teacher then sought judicial review of the school district's decision. Pointing out that the collective bargaining agreement between the teachers and their employer provided a grievance procedure under which teachers could grieve the accuracy of the school district's seniority list, the state's highest court ruled that the teacher's failure to utilize the grievance procedure precluded her from later seeking judicial review of the school board's decision to place her on unrequested leave. The board's decision had been based on the seniority list, and the list was treated as final and binding on the parties by reason of the teacher's failure to grieve. In the contrasting Minnesota case, the plaintiff, Pirotta, was "bumped" after a court decision that held that another teacher had more seniority than he did. Under those circumstances, the state's highest court ruled that the alleged violation arose when Pirotta was bumped, not when the seniority list was posted.[57] Accordingly, Pirotta could not have waived his claim of seniority by failing to grieve the seniority list. The court also rejected the school district's collateral estoppel argument relating to the prior litigation.

Other cases illustrate the issue of the choice of forum between arbitration and an administrative agency. In 1986, the Michigan courts reversed their posture in decisions regarding who should decide disputes involving school districts and their employees that are subject to arbitration and a Michigan Employment Relations Commission (MERC) proceeding. In May of 1986, the Michigan Court of Appeals held that where one dispute is subject to both contractual arbitration and a MERC proceeding, the MERC decision is dispositive to the extent that the dispute lies within MERC's jurisdiction.[58] In September that decision was vacated[59] in light of a new decision by the Michigan Supreme Court.[60] In the latter decision, the state's highest court held that: (1) the filing of an unfair labor practice claim with MERC does not preclude an arbitrator from resolving a breach of contract claim arising out of the same controversy; (2) MERC does not have jurisdiction over breach of contract claims unless the asserted breach of contract constitutes complete renunciation of the collective bargaining relationship; (3) the state's public collective bargaining statute neither expressly nor impliedly denied employees the right to pursue contractual grievances by requiring that proceedings relating to unfair practices be conducted by

56. Blank v. Independent School Dist. No. 16, 393 N.W.2d 648 (Minn. 1986).
57. Pirotta v. Independent School Dist. No. 347, 396 N.W.2d 20 (Minn. 1986).
58. Flint School Dist. v. United Teachers of Flint, 388 N.W.2d 355 (Mich. Ct. App. 1986).
59. Flint School Dist. v. United Teachers of Flint, 393 N.W.2d 176 (Mich. 1986).
60. Bay City School Dist. v. Bay City Educ. Ass'n, 390 N.W.2d 159 (Mich. 1986).

MERC; (4) conflicting arbitration awards will not be enforced when the right being asserted is "identical" to the right that has been adjudicated by MERC, and a right is identical when precise determinations necessary to establish a protected conduct in either forum is the same; (5) an arbitration hearing is required on a claim that the school board violated the collective bargaining agreement before it can be determined whether rights guaranteed by the agreement are identical to rights protected by the Act; and (6) in this case there was no conflict between the decisions of MERC that the school district did not violate the statute and the decisions of arbitrators that employees should be reinstated pursuant to the collecting bargaining agreement and, thus, the arbitration decisions were enforceable.

Finally is the choice of forum between administrative agencies and courts where arbitration is or cannot be sought. In New Jersey, for example, the appellate court decided the case of a teacher who sought to receive credit for teaching experience in another school district after she was transferred from a basic skills instructor to a regular teaching position.[61] The court held that upon the refusal of the board of education to comply with nonbinding arbitration, the proper forum was the court. The court, rather than the Commissioner of Education, had jurisdiction to interpret collective negotiations agreements where the only dispute between the local board of education and the teachers' union was the legal interpretation of the collective bargaining agreement provisions. As another example, in an Oregon case, teachers who had been disciplined following an out-of-school alcohol-related automobile accident brought suit against the school district for invasion of privacy, outrageous conduct, and breach of contract.[62] The appellate court held that the state's Employment Relations Board (ERB) had exclusive jurisdiction over any breach of agreement between the school district and the teachers' union and, thus, that the teachers could not initially resort to the courts in such cases. The proper route under Oregon law was to file an unfair labor practice with the ERB. As another variation on this same theme, the New Hampshire Supreme Court held that an allegation of wrongful demand to arbitrate charged an unfair labor practice, and as such in that state fell within the exclusive jurisdiction of the Public Employees Labor Relation Board.[63]

Procedural Issues

The grievance and arbitration process in the collective bargaining

61. Belleville Educ. Ass'n v. Belleville Bd. of Educ., 506 A.2d 1276 (N.J. 1986).
62. Trout v. Umatilla County School Dist., 712 P.2d 814 (Or. Ct. App. 1985).
63. School Dist. v. Murray, 514 A.2d 1269 (N.H. 1986).

agreement typically includes procedural requirements. The rigor with which the courts regard these purported requirements vary. The types of procedural requirements also vary.

A New York case reveals two types of procedural requirements, written formality and time limits.[64] The appellate court interpreted both rigorously, first finding that a community college president prematurely proceeded to the fourth step of a contractual grievance procedure, appealing a grievance board's decision to the county executive. The collective bargaining agreement provided that an appeal of the grievance board's decision had to be in writing and had to include all relevant considerations and facts that led to the decision, along with the reasons for dismissal or, if the grievance was sustained, the remedy. Because no written decision had yet been issued by the grievance board when the decision was appealed, the county executive's fourth-step decision was determined by the court to have no effect on the parties. Furthermore, the fourth-step decision had not been issued within fifteen days after receiving the grievance board's decision, as required by the collective bargaining decision, and the court determined that the purported waiver of the fifteen day time limit was ineffective.

Timing was also the essence of a Pennsylvania case, in which thirteen months after a teacher aide's job was adjusted she was furloughed.[65] The arbitrator ordered her reinstated with back pay, and the school district appealed. The arbitrator concluded that the matter had become ripe for protest thirteen months earlier, when the aide's duties were reassigned, but held that the matter was nonetheless arbitrable as a continuing grievance. Because the timeliness of the grievance was covered by the contract, and therefore squarely committed to the arbitrator's discretion, the court upheld the arbitrator's decision. The court obviously felt some reservations, but stated that "judicial disagreement with the arbitrator does not rise to the level of judicial outrage."[66]

Management Prerogatives as a Bar

Management prereogatives serve as a bar to prevent various subjects from being processed in the grievance and arbitration process. Thus, this section overlaps with the preceding Presumption of Arbitrability section.

In two New York cases decided in 1986, the courts supported school

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64. Adjunct Faculty Ass'n v. Purcell, 506 N.Y.S.2d 894 (App. Div. 1986).

65. Conneaut School Serv. Personnel Ass'n v. Conneaut School Dist., 508 A.2d 1271 (Pa. Commw. Ct. 1986).

66. *Id.* at 1275.

board claims that the topic in dispute was within the board's exclusive management prerogative. In the first case, the court held that decision making regarding teaching assignments was the employer's responsibility and could not be delegated or subverted by bargaining agreements or arbitrators.[67] In the second, another New York court held that although a collective bargaining agreement required just cause for the discharge and discipline of school employees, that agreement could not alter the fact that the power was vested solely with the superintendent.[68]

In contrast to New York's broad "public policy" exception to arbitration, two cases from other jurisdictions illustrate the smaller scope of the management prerogatives bar in many states. In a Massachusetts case, the state's highest court held that decisions about the granting of sabbatical leaves were not within the management's prerogative and, thus, were subject to the arbitrator's authority.[69] In an Illinois case, the appellate court noted in dictum that the determination of faculty qualifications was one of the nondelegable discretionary powers of the board of trustees of the college.[70] Here, however, the question presented to the arbitrator was not whether a grievant was qualified, but whether the decision of the board of trustees was actually favoring one employee over another under the guise of a qualification decision. The employer's decision was found to be arbitrable, despite the employer's claim of managerial prerogative.

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. Generally, an arbitrator's award is enforceable so long as, at least with regard to factual as compared to legal matters, it draws its essence from the collective bargaining agreement. Most of the 1986 cases adhered to that legal principle.

In a Massachusetts case, as a broad example, the appellate court upheld an arbitrator's award, finding that his interpretation of the collective bargaining agreement was not lacking in reason.[71] Noting that it is possible that the arbitrator's award was wrong, the court held that, absent fraud, a court may not pass on an arbitrator's alleged errors of

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67. *In re* Brighton Cent. School Dist., 505 N.Y.S.2d 522 (Sup. Ct. 1986).
68. Stoetzel v. Wappingers Cent. School Dist., 499 N.Y.S.2d 788 (App. Div. 1986).
69. School Comm. v. Watertown Teachers' Ass'n, 491 N.E.2d 615 (Mass. 1986).
70. Board of Trustees v. Cook County College Teachers Union, Local 1600, 487 N.E.2d 956 (Ill. App. Ct. 1986).
71. School Comm. v. Quincy Educ. Ass'n, 491 N.E.2d 672 (Mass. App. Ct. 1986).

fact or law. In another Massachusetts case the state's highest court upheld an arbitration award in a teacher dismissal case.[72] The court ruled that the arbitrator's use of a "just cause" standard, which was allegedly broader than the "good cause" standard required by the teacher dismissal statute, was appropriate where the school committee had agreed in a collective bargaining contract that no teacher was to be dismissed without "just cause." Thus, the court found that the arbitrator's award drew its essence from the collective bargaining agreement and that the decision to reinstate the teacher without back pay did not exceed the arbitrator's power.

As another potent example, consider an Indiana case where a school district sought to have an arbitrator's award vacated because, it claimed, the arbitrator slept while one of the district's expert witnesses testified.[73] The court refused to set aside the arbitrator's claim, holding that the arbitrator's award was enforceable so long as it drew its essence from the collective bargaining agreement, and that the school district failed to show prejudice by the arbitrator's alleged sleeping during testimony because the witness was only one of several witnesses who testified on the same subject.

Other cases illustrate institutional prerequisites or standards in various jurisdictions for judicial review of an arbitral award. For example, in an Indiana case a trial court ordered arbitration between a school district and the teachers' association, and the school district appealed.[74] The appellate court held that the order compelling arbitration was a final order because such an order had fully decided the issue before the court. As a final order, it was appealable. Similarly, in Pennsylvania a school district filed a petition for review of an award that was rendered by a second arbitrator in favor of a teachers' association after the first arbitrator had been discharged.[75] The appellate court held that it would be improper for the court to interfere with the decision of an arbitrator on such grounds, where the procedure agreed upon by the parties permitted dismissal of an arbitrator and the appointment of another. However, the case was remanded for an evidentiary hearing, findings, and conclusions at the trial court level. After such a hearing, the court could review the award to determine whether it was drawn from the essence of the collective bargaining agreement.

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72. School Comm. v. Needham Educ. Ass'n, 500 N.E.2d 1320 (Mass. 1986).

73. Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337 (Ind. Ct. App. 1986).

74. Evansville Vanderburgh School Corp. v. Evansville Teachers' Ass'n, 494 N.E.2d 321 (Ind. 1986).

75. Bensalem Township School Dist. v. Bensalem Township Educ. Ass'n, 512 A.2d 802 (Pa. 1986).

Other 1986 cases concerned the review of decisions by administrative agencies. Exemplifying the prevailing review standard in such cases, a Maryland appellate court held that a court may not substitute its judgment for that of the findings of fact by the state board of education in an unfair labor practice challenge; rather it must only determine if there was substantial evidence to support the agency's findings.[76] If the court finds that there is such evidence, the findings must be affirmed even if the court disagreed with them and would not have reached the same conclusion.

For procedural matters, the review standard typically is "abuse of discretion." For example, two teachers filed a complaint with the Pennsylvania Labor Relations Board after they were furloughed, allegedly because of a cut in federal funding. The PLRB found the school district guilty of unfair labor practices. Exceptions to the proposed order were posted by the school district twenty-two days later, two days beyond the twenty-day statutory period. The PLRB dismissed the exceptions for untimeliness. However, the court found that the district had justifiably delayed its exceptions, because the hearing examiner had created a mistaken assumption on the district's part that there would be a second hearing.[77] According to the court, the PLRB had the power to hear the exceptions, and its failure to do so, despite the actions by the hearing examiner which had contributed to the late filing of the exceptions, was adequate support for a finding, as a matter of law, that the PLRB abused its discretion.

The procedural prerequisite for judicial review of such an administrative agency determination is illustrated by a New York case in which a teachers' association filed improper practice charges against a school district.[78] The association claimed that a four-month filing limitation, applicable to the filing of improper claims, began when the association sent letters to the district requesting negotiations on the matter. The court found that the four-month limitation began on the date the district notified the association of the action it had taken. The court noted that any other interpretation would allow the prosecution of stale claims, a result that the four-month filing period was specifically designed to avoid. Similarly, in an Illinois case where the school board sought to vacate an arbitration award, the appellate court held that arbitration awards in public education were not judicially reviewable under the

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76. Board of Educ. v. Montgomery County Educ. Ass'n, 505 A.2d 905 (Md. Ct. Spec. App. 1986).

77. Pennsylvania Labor Relations Bd. v. Northwestern Educ. Intermediate Unit No. 19, 505 A.2d 1068 (Pa. Commw. Ct. 1986).

78. Hauppauge Teachers Ass'n v. New York State Employment Relations Bd., 497 N.Y.S.2d 198 (App. Div. 1986).

Illinois Uniform Arbitration Act except in a proceeding to review a determination by the state Educational Labor Relations Board as to whether an employer's failure to comply with an arbitration award is an unfair labor practice.[79] And, the court added, such ELRB determinations are entitled to judicial deference. As a final and different example, in a Massachusetts case a teacher challenged the amount of his agency fee.[80] After the state's Labor Relations Commission dismissed his complaint, he appealed. The Commission, however, refused to assemble and forward the record to the appeals court, taking the position that a dismissal of charges was not a final order under the Massachusetts statute and therefore not subject to judicial review. The appellate court disagreed, holding that any decision by the Commission, including a prehearing dismissal, that effectively determines the outcome of a constitutionally based challenge of an employee's agency fee was a "final order" subject to judicial review.

Propriety of Awards. Again in 1986, the vast majority of courts upheld arbitrators' awards. The courts' review of arbitration awards generally followed the traditional and deferential "essence test." That test requires the court to uphold the arbitrator's decision if the interpretation in any rational way can be viewed to be derived from the essence of the collective bargaining agreement. The overriding judicial policy is one of deference to, and a presumption in favor of, labor arbitration awards. In addition to the cases summarized under the preceding and overlapping the Standard of Review section, several other court decisions were rendered dealing with the propriety of arbitrator and administrative agency awards.

In Pennsylvania, the appellate court upheld an arbitrator's award that determined that teachers with more than ten years of employment who were furloughed by the school district were still entitled to the sabbatical leave rights provided in their collective bargaining agreement.[81] The court also agreed with the arbitrator's decision that the school district was not entitled to a set off for the earnings the teachers made as substitute teachers while on furlough; inasmuch as the teachers had been refused sabbaticals and the one-half salary to which they were entitled, the court did not consider mitigation to be appropriate here.

Similarly, an appellate court in New York upheld an award in which the arbitrator determined that the collective bargaining agreement

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79. Chicago Bd. of Educ. v. Chicago Teachers Union, 491 N.E. 2d 1259 (Ill. App. Ct. 1986).

80. Lyons v. Labor Relations Comm'n, 492 N.E. 2d 343 (Mass. 1986).

81. School Dist. v. Duquesne Educ. Ass'n, 512 A.2d 103 (Pa. Commw. Ct. 1986).

between a teachers' association and the school district had been violated when the school calendar was changed to require students to attend a full rather than half day on the first day of school.[82] The agreement had required that the calendar be the same form and structure as the previous year, when only a half day was required. The court also upheld the arbitrator's remedy, compensation for the extra work performed, rejecting the argument that it was an impermissible gift of public money.

In both Ohio and Pennsylvania, appellate courts upheld arbitrators' decisions which had ordered school districts to grant employees' requests for transfer.[83] In each case, the court found that the arbitrator's award was drawn from the essence of the collective bargaining contract, which provided that preference in filling a vacancy would be given to the employee with the greatest seniority when qualifications of two or more employees requesting transfer were equal.

In each of two other Pennsylvania cases, the appellate court upheld arbitrators' awards in the context of higher education. In one case the court upheld, under the essence test, the arbitrator's determination that the college was required to afford faculty members the opportunity to teach courses before utilizing part-time or special employees.[84] The court's enforcement in this case, however, was only partial; the court vacated the arbitrator's award of damages, finding that no financial loss had been sustained. In the other case, an arbitrator had awarded retirement benefits, based on a collective bargaining agreement between the college and the union that provided for computing a retirement allowance on the basis of accumulated sick leave.[85] The city, which administered the assets of the college, challenged the payment of the sick leave to retiring workers, alleging that it violated the statute applicable to municipal employees. Finding that the city's administration of the college's assets did not render the college employees city employees, the court upheld the arbitrator's award.

Similarly, an appellate court in Washington upheld an arbitrator's award of compensation to teachers who were denied a preparation period as provided in the collective bargaining agreement, despite the

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82. East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 497 N.Y.S.2d 484 (App. Div. 1986).

83. Mahoning County Bd. of Mental Retardation & Dev. Disabilities v. Mahoning County T.M.R. Educ. Ass'n, 488 N.E.2d 872 (Ohio 1986); AFSCME Dist. Council 84, Local 297 v. Board of Pub. Educ., 503 A.2d 1044 (Pa. Commw. Ct. 1986).

84. Community College of Beaver County v. Community College of Beaver County Society of the Faculty, 513 A.2d 1125 (Pa. Commw. Ct. 1986).

85. Philadelphia v. Local 473 Int'l Bhd. of Firemen & Oilers, 508 A.2d 630 (Pa. Commw. Ct. 1986).

fact that the teachers did not specifically request money damages in their grievance.[86]

As a final example, Massachusett's highest court upheld an arbitrator's award that reinstated a teacher with back pay after the school board had suspended him for striking a student in violation of the statutory prohibition of corporal punishment.[87] Interpreting the statute to only prohibit intentional conduct and deferring to the arbitrator's finding that the teacher's act was unintentional, the state supreme court reversed a lower court's vacating order.

In keeping with the prior trend, only rarely in 1986 did courts reverse or vacate an arbitrator's award. In one of those rare reversals, a trial court in Massachusetts vacated an arbitrator's award that had granted a public school custodian vacation and longevity pay while he was disabled. The appellate court affirmed the trial court's ruling, holding that the custodian, who was receiving workers' compensation benefits for total incapacity, was entitled to be paid for vacation earned but not taken in the year in which he became totally disabled.[88] He was entitled to receive neither vacation pay for the years in which he did not work at all nor longevity pay for a portion of one of those subsequent years. The court found that such payments to the custodian were plainly forbidden under state statute and that the arbitrator's award was properly vacated as having been made in excess of his powers. Similarly, Michigan's highest court overturned an arbitral award, holding that the arbitrator had exceeded his authority in requiring the school district to offer a physical education position to the next available teacher without regard to the sex of the teacher.[89] Finding that the arbitrator's decision implicitly would have required the school district to hire additional female aides to supervise the girls' locker room, the court pointed out that the collective bargaining agreement explicitly provided that arbitrators shall have no power to increase or change any staffing requirement. As illustrated by these two cases, courts will typically only overturn arbitral awards that clearly contravene express requirements of either external law or contractual language.

Courts also continued to demonstrate deference to the decisions of state labor relations agencies. For example, a Florida court upheld a PERC ruling that a school board had committed an unfair labor practice by its unilateral alteration of the employees' workday and planning

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86. Endicott Educ. Ass'n v. Endicott School Dist. No. 308, 717 P.2d 763 (Wash. Ct. App. 1986).

87. School Comm. v. Waltham Educ. Ass'n, 500 N.E.2d 1312 (Mass. 1986).

88. School Comm. v. Medford Pub. School Custodians Ass'n, 487 N.E.2d 540 (Mass. App. Ct. 1986).

89. Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 393 N.W.2d 811 (Mich. 1986).

time.[90] With due deference to the administrative agency, the court held that absent a clear and unmistakable waiver by the bargaining representative, exigent circumstances, or legislative action imposed as a result of an impasse, the employer's unilateral actions constituted a *per se* violation of the state's unfair labor practices provision.

As one of the less frequent examples on the opposite side, the Montana Supreme Court upheld the reversal of a state personnel board's ruling that a school district had committed an unfair labor practice.[91] The court found that the school district's payment to nonstriking teachers for eighteen days of work where the teachers had agreed to work the full eighteen days, but actually were only required to work one day, was not justified as a legitimate and substantial business decision. As another such example, an appellate court in Oregon reversed an employment relations board's decision to dismiss unfair labor practice charges brought against the school district by two discharged school secretaries, who alleged that the principal's notes in his "problem" file were personnel files that they were entitled to review.[92] The principal had begun this problem file on the two secretaries after rumors, which he attributed to them, circulated that he was having an extramarital affair with another secretary. The collective bargaining agreement contained the following language: "Personnel records shall not contain any information of a critical nature that does not bear the employee's signature or initials, indicating that the employee has been shown the material . . . . The District agrees that it is an employee's right under the law to inspect his or her personnel file."[93] Overruling the employment relations board's dismissal of the unfair labor practice charge, the appellate court held that the principal's files constituted employment evaluations of the employees and, as such, were "personnel files" under the collective bargaining agreement; therefore, the school district committed an unfair labor practice by keeping such critical records on employees without giving the employees a chance to see and explain critical information contained therein.

Interpretation of Collective Bargaining Legislation. In Kansas a teachers' association sent a notice to the school district requesting negotiations "on each and every article in the contract now in

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90. Florida School for the Deaf & Blind v. Florida School for the Deaf & Blind Teachers United, 483 So. 2d 58 (Fla. Ct. App. 1986). For another such case, see *supra* note 77 and accompanying text.

91. Missoula County High School Dist. v. Board of Personnel Appeals, 727 P.2d 1327 (Mont. 1986).

92. Oregon School Employees Ass'n v. Lake County School Dist., 726 P.2d 955 (Or. Ct. App. 1986).

93. *Id.* at 957.

effect." The state's Professional Negotiations Act required the parties to enter into negotiations at the request of either party at any time prior to the issuance of new contracts. In addition, it required that written notice of the intent to negotiate on new items or to amend an existing contract be given to the opposite party "in reasonable and understandable detail." The court found that the association's above cited request fell short of indicating to the school district in the required detail the purpose of any contemplated new or amendable items.[94] The court concluded that since the notice provision in the statute appeared to be mandatory, and the school board was never served with sufficient notice, the board was under no duty to enter into professional negotiations with the association.

Interrelationship with Others Laws. Occasionally cases arising within the context of collective bargaining laws also involve statutes concerning other matters.

Several Minnesota cases concern the relationship between contracts negotiated under the state's collective bargaining statute and cases arising under that state's reduction-in-force statute. In the first of these cases, a group of teachers appealed a school district's decision to place them on unrequested leave because of financial limitations, decreasing enrollments, and discontinued positions. The appellate court found that there was substantial evidence supporting the decisions to place the teachers on unrequested leave in all but one instance, in which the decision to discontinue the position of one instructor in a dental lab was determined to be arbitrary and capricious.[95] In each instance, the court found no violation of the seniority provision in the collective bargaining agreement. In the second case, the same appellate court held that a school board did not violate the collective bargaining agreement when it placed four teachers on unrequested leave of absence.[96] The decision was held to be proper because each of the teachers had either failed to acquire proper licensure and qualifications, failed to prove licensure at the required time, or were not licensed on the date they were originally hired by the school district. In the third case, the same court found that the state RIF statute and the seniority provision of the collective bargaining agreement conflicted and that in cases of confict the statute controlled.[97] Inasmuch as the school district had placed the teacher plaintiffs on requested leave in accordance with the controlling state

94. Unified School Dist. No. 252 v. South Lyon County Teachers' Ass'n, 720 P.2d 1119 (Kan. Ct. App. 1986).

95. Bye v. Special Intermediate School Dist., 379 N.W.2d 653 (Minn. Ct. App. 1986).

96. *In re* Meyer, 381 N.W.2d 476 (Minn. Ct. App. 1986).

97. Urdahl v. Independent School Dist. No. 181, 396 N.W.2d 244 (Minn. Ct. App. 1986).

statute, its decision was upheld. In the fourth Minnesota RIF case, the same appellate court upheld a school board's decision to reassign an administrator to a teaching position, thereby "bumping" teachers.[98] The court held that the "bumping" of a less senior classroom teacher was proper, despite the administrator's lack of actual classroom teaching experience in the district because the decision was based on licensure and date of hire. Finding that both the teachers' and administrators' collective bargaining agreements were silent with regard to seniority, the court determined seniority status based on the controlling RIF statute.

In a Kansas case, an appellate court found a conflict between the collective bargaining agreement and the state's collective bargaining statute.[99] The school district sought a determination that a tenured teacher's refusal to accept an extra duty basketball coaching position amounted to insubordination and was a breach of contract. The collective bargaining agreement contained a provision that the district could assign duties when they could not be filled voluntarily. The contract also permitted the school district to unilaterally terminate or nonrenew a contract if a teacher refused to accept supplemental duties. The appellate court entered a declaratory judgment in favor of the teachers, holding that the collective bargaining provisions relied upon by the school board were void and unenforceable because they conflicted with the state statutory scheme regarding teachers' collective contracts.

A similar holding was reached in an Indiana case based on the conflict between the collective bargaining agreement and the state's teacher tenure statute.[100] A nontenured teacher appealed his determination. The court held that the collective bargaining agreement's provision for a fair hearing opportunity for nontenured teachers was in violation of the state's teacher tenure act and therefore was void.

Likewise, in an Illinois case, the appellate court upheld the board of trustees of a community college in ruling that the statute governing the dismissal of nontenured faculty members did not apply retroactively.[101] Inasmuch as matters relating to tenure and dismissal had been within the complete discretion of the employer before the statute, they were not subject to modification by a collective bargaining agreement.

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98. Evans v. Independent School Dist. No. 281, 398 N.W.2d 616 (Minn. Ct. App. 1986).
99. Unified School Dist. No. 241 v. Swanson, 717 P.2d 528 (Kan. Ct. App. 1986).
100. Thombleson v. Board of School Trustees, 492 N.E.2d 327 (Ind. Ct. App. 1986).
101. Williams v. Weaver, 495 N.E.2d 1147 (Ill. App. Ct. 1986).

IMPASSE AND DISPUTE RESOLUTION

Rights on Expiration of Contracts

There were three separate cases in 1986 which dealt with the effect of a collective bargaining agreement after its expiration date. In one case in Massachusetts, the court affirmed an arbitration decision, holding that the school committee, which had participated in an arbitration hearing without raising any claim before the arbitrator that the collective bargaining agreement had expired, could not raise a claim of lack of jurisdiction on appeal.[102]

In another Massachusetts case, the appellate court reached the same result based on a different route.[103] A controversy did not occur until the teacher was terminated, which was after the expiration of the collective bargaining agreement. The court held that since the incident for which the teacher was disciplined took place while the contract was in effect, the dispute over the termination arose under the agreement and the teacher was entitled to arbitration pursuant to the terms of the agreement.

Similarly, in a New York case a community college association brought a proceeding for review of a PERB determination regarding salary increments. The appellate court concluded that the argument regarding the employer's refusal to pay salary increments to faculty members pursuant to an expired collective bargaining contract was actually moot, because a subsequent collective bargaining agreement, which was retroactive to the expiration date of the previous contract, did not provide for step advancements during the first year of a successor agreement.[104]

CONCERTED ACTIVITY

Strikes and Other Job Actions

Teachers in a Pennsylvania school district were awarded unemployment compensation benefits during the period of a work stoppage, and the school board appealed. The Supreme Court of Pennsylvania considered the question of whether this work stoppage was a strike or a lockout.[105] The stoppage occurred when the school board replaced one insurance carrier with another. The collective bargaining contract provided that such a substitution was allowable provided that insurance

102. School Comm. v. Revere Teachers' Ass'n, 492 N.E.2d 748 (Mass. App. Ct. 1986).
103. Old Rochester Reg. Teachers' Club v. Old Rochester School Dist. Comm., 500 N.E.2d 1315 (Mass. 1986).
104. Faculty Ass'n v. Public Employment Relations Bd., 508 N.Y.S.2d 591 (App. Div. 1986).
105. Norwin School Dist. v. Belan, 507 A.2d 373 (Pa. 1986).

benefits were equivalent. The PLRB determined that the two health plans were not equivalent, and the court upheld that conclusion. Accordingly, since the subsequent cessation of work resulted from the school district's failure to provide health coverage pursuant to the terms of the contract, the court characterized the work stoppage as a lockout rather than a strike. The school district's offer to restore the original health plan, only upon the precondition that the teachers cease their work stoppage and return to work, did not convert the lockout into a strike for unemployment compensation eligibility purposes. Thus, the court held that the teachers' awards of unemployment benefits during the work stoppage were proper.

In another case a Pennsylvania school district brought an action seeking an injunction against a teachers' strike. Although the case was moot by the time it reached the appellate court, the court decided its merits because it involved an important and recurring public issue which would otherwise repeatedly escape judicial review.[106] The court upheld the injunction against the teachers, ruling that the strike by public school teachers created a clear and present danger to the public through the possibility of decreased state funding to the school district if it failed to provide the yearly requirement of 180 days of instruction.

In an Illinois case, faculty members at a community college engaged in an illegal strike. The issue in litigation was whether the college acted properly in including a one-day holiday during the strike period as one of the days for which the faculty members would not be paid. The appellate court ruled in favor of the faculty, holding that they were under no duty to provide services to the college on a legal holiday and that their salaries were improperly "docked" for that one day.[107]

In Louisiana a school district implemented a reduction-in-force three and one half months after the employees had engaged in a legal strike. The plaintiffs alleged that the board violated the terms of the previously negotiated contract in conducting the reduction-in-force, in that it used a "super seniority" list which constituted direct reprisal against those employees who participated in the strike. The state appellate court held that an agreement made by the school board with the new employees could not be considered in determining the rights of the former strikers with the board; only the contract between the board and the strikers could be considered.[108] Also, a letter authorized by the superintendent during the strike advising that all employees who did not

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106. Jersey Shore Educ. Ass'n v. Jersey Shore Area School Dist., 512 N.E.2d 805 (Pa. Commw. Ct. 1986).

107. Allen v. Board of Trustees, 492 N.E.2d 1168 (Ill. App. Ct. 1986).

108. St. John the Baptist Ass'n of Educators v. Brown, 494 So. 2d 553 (La. Ct. App. 1986).

return to work by a specified date would be presumed to have abandoned their position, was determined to be without effect on the subsequent contract approved by the board and the employees, where the letter was not made a part of that later contract. The court ordered that the teachers be reinstated with full seniority and be placed in the same economic position that they would have enjoyed had they not been dismissed.

During a teachers' strike in Rhode Island a trial court issued a preliminary injunction against the continued strike and subsequently adjudicated fifty-three teachers and the union to be in civil contempt. The Rhode Island Supreme Court denied the appeals by the teachers and the union, and the case was remanded for further proceedings.[109] The court found that the posting of copies of the contempt citations on the doors of the homes of the teachers was sufficient notice and that the union waived any lack of notice claim when its counsel announced in court that it was ready to proceed. The union had also claimed that there was insufficient evidence to prove that it was in contempt in that the officers did not even confer with one another or with any of the membership after the injunction had been issued. The court rejected that argument, finding that there was competent circumstantial evidence for the civil contempt charge in that the union officers refused to comply with the injunction and through its officers actions it had signaled its membership to continue with the policy of no contract, no work.

In the final strike-related case, a New York appellate court hearing the case held that: (1) according to state statute the determination that the teachers had participated in a prohibited strike became final twenty days after the teacher received notice of the determination and made no objections; (2) the determinations were not invalid on the ground that they were prepared by the assistant superintendent, rather than the superintendent; and (3) the method of computing the financial penalty against the teachers was consonant with the statute governing such penalties.[110]

MISCELLANEOUS DECISIONS

In West Virginia, service personnel filed a class action grievance against a board of education, seeking back pay from special levies passed by the voters of the school district. During the pendency of the grievance settlement negotiations, a separate class action suit was brought against the board on behalf of claimants who chose not to

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109. School Comm. v. Pawtucket Teachers' Alliance, 510 A.2d 943 (R.I. 1986).

110. Barner v. Jeffersonville-Youngsville Cent. School Dist., 502 N.Y.S.2d 285 (App. Div. 1986).

accept the proposed settlements. The trial court entered a judgment order, approving the proposed settlements, giving those claimants substantially more money than was received by the litigants who accepted the proposed settlements. When the board moved to set aside the judgment in the separate action, the trial court set aside the orders in both actions. The school board and the representatives of the original class action petitioned the state supreme court, which held that: (1) the claimants who opted out of the original class and brought a separate class action lacked standing to challenge the settlement approved in the original class action; and (2) the trial court's setting aside of the settlement, on the grounds that the school board was behaving reprehensibly by contesting the order in the separate class action while settling with the original class, was an abuse of judicial discretion.[111] Accordingly, the supreme court issued the writ of prohibition, prohibiting the trial court from setting aside its original order.

In an Ohio decision, the state's supreme court ruled that an arbitrator's award did not, in the circumstances of the case, preclude a nonrenewed teacher's mandamus action.[112] Similarly, in a Seventh Circuit decision, the court held that a prior arbitrator's decision, pursuant to a collective bargaining decision, did not have a preclusive effect in a subsequent title VII suit.[113]

In a peripherally related case, relevant only because it arose in the context of a teacher's association, the executive director of the association brought an action against its retirement plan. The question presented to the court concerned the retirement benefits to which the plaintiff was entitled. The federal district court held that: (1) the executive director was an eligible nonunit member in the employment of the association on the eligibility date of the retirement plan so as to be entitled to a lump-sum cash payment option under the early retirement incentive plan; and (2) under the deferred compensation agreement he was entitled to either the cash surrender value or the actual ownership of term insurance policies maintained by the association on the date he terminated his employment, but the association was not required to continue to pay the policy premiums.[114]

Finally, in a New York case the contract of a custodian was terminated for allegedly falsifying her time records. According to the collective bargaining agreement procedure she was entitled to a

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111. Board of Educ. v. Starcher, 343 S.E.2d 673 (W. Va. 1986).

112. State *ex rel.* Francu v. Windham Exempted Village School Dist. Bd. of Educ., 496 N.E.2d 902 (Ohio 1986).

113. Johnson v. University of Wis.-Milwaukee, 783 F.2d 59 (7th Cir. 1986).

114. Hebert v. Massachusetts Teachers Ass'n Retirement Plan, 627 F. Supp. 535 (D. Mass. 1986).

"meaningful hearing" on the matter. The school board failed to produce her supervisor at the hearing, and instead presented the supervisor's testimony by way of a predated, signed statement. The employee was given no opportunity to respond to the statement. The appellate court determined that such conduct denied the employee of a "meaningful hearing," and the case was remanded for a new hearing.[115]

CONCLUSION

The year 1986 gave us many cases in the area of collective bargaining in education. It seems reasonable to expect that this increase in litigation in this area will continue. The number and variety of cases decided by the courts in 1986 was larger than in recent previous years, and there is no reason to suspect that in the future there will be any reduction in the propensity of either labor or management to litigate collective bargaining issues.

No new legal principles were established in the 1986 collective bargaining cases in education and no startling legal precedents were handed down. The courts continued to uphold arbitrators' awards and, to a lesser extent, employment board decisions.

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115. Verbeeck v. Board of Educ., Shoreham-Wading River Cent. School Dist., 500 N.Y.S.2d 293 (App. Div. 1986).